IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.177 OF 1999

IN

COMPANY PETITION NO.115 OF 1992

M/s.Kavim Import Export (India) Pvt.Ltd. ...Appellant

vs.

Satyam Sarees. ...Respondent.

Mr.A.M.Vernekar, for Appellant.

None for Respondent.

CORAM: D.K.DESHMUKH &

J.H. BHATIA, JJ.

DATED: 24th September, 2007.

P.C.:-

1. By this appeal, the appellant who was the original respondent in the Company Petition no.115 of 1992 challenges the order dated 11.1.1999 by which the learned Single Judge has ordered liquidation of the appellant-company. That order came to be passed in the company petition filed by the present respondent for winding up of the appellant-company on the ground that it is unable to pay its debt. According to the respondent, the respondent had supplied certain goods to the appellant-company. There was a running account maintained in the account books of the respondent. That account showed that an amount of Rs.2,50,819.50 was due and payable by the appellant-company to the respondent. The respondent also claimed that the appellant had given certain post dated cheques for repayment of the amount but those cheques were dishonoured.

The petitioner in the company petition also stated that the petitioner had received letters from the appellant-company stating that the goods supplied by the petitioner were found defective and therefore, post dated cheques given by the original respondent to the petitioner should not be presented in the bank. The appellant filed a reply. In the reply, the main contention of the appellant was that the petition was based on the running account and therefore, in terms of provisions of the Evidence Act unless the entries are proved, the company petition for winding up on the basis of those entries cannot be entertained. So far as the post dated cheques given by the appellant-company to the respondent firm are concerned, it was submitted that the cheques were given because certain assurance was given by the respondent and as the appellant found that the goods were defective, the appellant informed the respondent not to put the cheques in the bank. The learned Single Judge has

passed order dated 11.1.1999.

2. So far as the principal defence raised by the appellant that because the winding up petition is based on the running account, it cannot be entertained and it cannot be said that the debt is an admitted debt. The learned Single Judge has accepted that if the petition is based only on the running account, the Court would not be justified in winding up the company merely for that reason, but the learned Single Judge has found that because the appellant had given post dated cheques for payment of the amount which is shown due from the appellant to the respondent at the foot of the running account, according to the learned Single Judge such a debt can be termed as an admitted debt. The learned Single Judge therefore, has directed winding up of the appellant-company. However, the learned Single Judge has stayed that order. In the appeal, the appellate Court has also continued the order of

stay. Thus, the order of the learned single Judge of winding up the appellant-company really never came into operation. The submission of the appellant is that the learned Single Judge while recording the findings that the entries in the running account are admitted by the appellant because of the post dated cheques, has not considered the letter which was produced by the petitioner-present respondent alongwith the petition as also relied on by the appellant in the reply, and therefore, according to the learned Counsel, the conduct of the appellant of issuing post dated cheques could not have been taken as admission of the debt.

3. None appears for the respondent though served. We have gone through the record. So far as the principle defence of the appellant is concerned, it has been dealt with by the learned Single Judge by making following observations in paragraph (5) of the judgment which read as

under:-

> “ That leads us to the first contention that the Petition for winding up is not maintainable on the ground that it is on account of a running account. It is true that the Petitioners have referred to a running account. That facts, however, remains that there has been no transactions subsequently except two transaction for which monies were paid. In respect of the present transactions cheques were issued by the Respondent Company. The issuance of cheques has been admitted. The only defence is that there was an understanding that the defective goods would be taken back and the petitioners would supply fresh material against the said goods issued and a statutory notice was served, it is presumed that the Company was justly indebted to the petitioners. It is then for the Respondent Company to point out that they were not justly indebted to the

> Petitioners-company. Even in the case of Chandradhar Goswani (Supra) while considering Section 34 of the Evidence Act the apex court itself has noted that mere entries in the Books of Account by themselves will not be sufficient to charge person with liability except when person concerned accepts correctness of the entires. In the instant case, cheques have been issued in respect of the amounts. Hence reliance on the case of Chandradhar Goswami & ors. (Supra) is misplaced."

4. Perusal of the above quoted observations of the learned Single Judge shows that if the petition was based merely on the running account, it would not have been maintainable. However, according to the learned Single Judge, because the appellant had given post dated cheques for payment of the amount which was shown due at the foot of the account, the liability becomes an admitted liability and therefore, the learned

Single Judge has not accepted the defence put up by the appellant-company. Perusal of the reply that was filed by the appellant-company in the company petition shows that the appellant had explained that six post dated cheques for diverse amounts were handed over by the appellant to the respondent because of the assurance given by the respondent that the goods which were found to be defective by the respondent would be replaced by the appellant. It was further stated that when despite the assurance given the defective goods were not replaced, letter dated 5.7.1991 was written pointing out that the defective goods have not been replaced, and therefore, post dated cheques should not be put in the bank. The letter dated 5.7.1991, in fact, was produced on record by the petitioner itself. Therefore, it does appear that the statement of the appellant about the circumstances in which the post dated cheques were handed over by the appellant to the respondent and the letter asking the respondent

not to put the post dated cheques in the bank, was relevant fact and was required to be considered before the learned Single Judge recorded the finding on the basis of the post dated cheques that the entries in the running account were admitted by the appellant. In our opinion, non-consideration of the defence referred to above put up by the appellant in its reply and the correspondence exchanged between the parties about the post dated cheques was relevant, however, the order impugned in the appeal shows that that material has been excluded from consideration by the learned Single Judge. Therefore, in our opinion, the order of the learned Single Judge suffers from non application of mind to the relevant material, and therefore, in our opinion, the order impugned in the appeal is liable to be set aside. In the result therefore, the appeal succeeds and is allowed. The order impugned in the appeal is set aside.

5. Pursuant to the interim order in the appeal, an amount of Rs.1,00,000/- was deposited by the appellant in this Court. As observed above, none appears for respondent. As we have allowed the appeal, the amount deposited by the appellant will have to be returned to the appellant with accruals. It is accordingly so ordered. However, the Prothonotary and Sr.Master of this Court is directed to refund the amount to the appellant with accruals only after a period of six weeks from today.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)